IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9025 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2 To be referred to the Reporter or not ? NO

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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BARODA CITY CO.OPERATIVE BANK - Petitioner(s)
Versus
PIONEER BALL BEARING & ENGINEERING COMPANY & 2 - Respondent(s)

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Appearance :
MR MIHIR JOSHI, SENIOR ADVOCATE FOR MR SP MAJMUDAR for Petitioner(s) : 1,
MR N.D. NANAVATI, SENIOR ADVOCATE FOR MR R.D. DAVE for Respondent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 01/08/2007

ORAL JUDGMENT

1 Rule. Learned Advocate appearing on behalf of the respondents is directed to waive service. The petition is taken up for final hearing and disposal today in light of the view that the Court is inclined to adopt.

2 This petition has been filed praying for following reliefs :

> *"8. In the aforesaid premise, the petitioner prays :*
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> *(A) YOUR LORDSHIPS may be pleased to issue a writ of mandamus/certiorari or any other appropriate writ, order or direction quashing and setting aside the impugned order dtd.18.10.2006 passed by the Gujarat State Co-operative Tribunal, Ahmedabad in Revision Application No. 113/2006 as well as the order dtd. 17.03.2006 passed below Ex.25 application filed by the respondents in Lavad Suit No.890/2005, in the interest of justice;*
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> *(B) YOUR LORDSHIPS may be pleased to stay the implementation, operation and execution of the impugned order dtd. 18.10.2006 passed by the Gujarat State Co-operative Tribunal, Ahmedabad in Revision Application No. 113/2006 as well as the order dtd. 17.03.2006 passed below Ex.25*

application filed by the respondents in Lavad Suit No.890/2005, pending hearing and final disposal of the present petition;

(C) YOUR LORDSHIPS may be pleased to grant such other and further reliefs as may be deemed fit and proper by this Hon'ble Court in the interest of justice;"

3 It is an admitted position that the petitioner bank advanced certain loan and financial facilities to respondent No.1, which according to the petitioner was to the tune of Rs.1.20 crores. Ultimately on 01.01.2001 all the accounts were declared as Non Performing Assets. In 2002 the petitioner bank filed a suit before the Board of Nominees for recovery of total amount of Rs. 1,73,00,000/- and the said suit was numbered as Lavad Suit No. 592 of 2002. Vide communication dated 08.11.2003 respondent No.1 proposed to pay the sum of Rs.1.78 crores, after discussion with the bank, in the following manner :-

"(i) Rs.25 Lakhs by 15.11.2003.

(ii) Rs.25 Lakhs by 31.12.2003.

(iii) Rs. 20 Lakhs by 31.03.2004

(iv) Amount received by mortgaging the assets of the respondent no.1.

(v) Balance amount will be paid in equal installments by 30.09.2004".

In pursuance to the proposal made by respondent No.1 between 17.11.2003 to 25.03.2004 respondent No. 1 paid off a total amount of Rs.77 Lakhs.

4 On 25.08.2004 notice under Section 13(2) of *The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002* (the Securitisation Act) was issued by the petitioner bank demanding a sum of Rs.97,38,343/-. Respondent No.1 replied to the said notice vide letter dated 18.10.2004. The objection/reply of respondent No.1 was not accepted by the petitioner bank vide communication dated 3.11.2004.

5 On 6.11.2004 respondent No.1 and the petitioner bank entered into a Memorandum of Understanding (MOU) which reads as under :

" MEMORANDUM OF UNDERSTANDING.

The following are the points discussed in the meeting at the Circuit House, Baroda on 6th November 2004.

Present : Mr.Ramesh C. Shah – Pioneer Ball bearing & Engg.Co.
Mr.Bharat Gupta.

Mr.Bhupendra Patel – The Baroda City Co-op. Bank Limited.
Mr.J.M.Bhatt.

1. Please refer to the letter dated 08th November 2003 by Pioneer Ball Bearing & Engg. Co. to Baroda City Co-op. Bank Limited.

2. Please refer to the Notice under the Securitization Act dated 25.08.2004 issued by The Baroda City Co-op. Bank Limited to Pioneer Ball Bearing & Engg. Co. for the recovery of outstanding amount of Rs.97,38,343.00.

3. Please refer to the letter dated 18.10.2004 by Pioneer Ball Bearing & Engg. Co. to The Baroda City Co-op. Bank Ltd. and subsequent letter dated 03.11.2004 by the Bank's Advocate Mr. Anil M. Patel.

It was decided as follows :

1 Pioneer ball Bearing & Engg. Company will give an amount of Rs. 13.00 lakhs by cheque dated 10.11.2004.

2 Pioneer ball Bearing & Engg. Company will give an amount of Rs. 8.00 lakhs by cheque dated 11.11.2004 with a request that due to festive season, the cheque should be deposited by the Bank before 30.11.2004 with prior intimation to Pioneer ball Bearing & Engg. Co.

3 Pioneer Ball Bearing & Engg. Co. will pay another amount of Rs. 29.00 lakhs by 28.02.2005 thus totaling to Rs. 50.00 lakhs and will make every endeavor to pay up to Rs.60.00 lakhs.

4 Out of Rs.97,38,343.00 due to your Bank, and after adjusting the above amount of Rs.50.00 lakhs (or Rs.60.00 lakhs as the case may be), a request to convert the balance amount along with interest to be converted into a Term Loan for a period of nine months from 01.04.2005 to 31.12.2005 and the amount to be paid in 9 equal installments.

5 Pioneer Ball Bearing & Engg. Co. will withdraw their letter dated 15.10.2004 issued to The Baroda City Co-op. Bank Limited and the Bank will withhold the movement of attachment of the propriety. Kindly return the cheque of Rs.5.00 lakhs given to the Bank along with letter dated 15.10.2004 and also return the cheque of Rs.40.00 Lakhs given to the bank along with the letter dated 18.10.2004.

Signed on behalf of Pioneer Ball Bearing & Engg. Co.

Sd/-
Mr.Ramesh C.Shah

Signed on behalf of the Baroda City Co.op Bank Ltd. for THE BARODA CITY

Sd/-
Manager.

6 It is an accepted fact that the schedule envisaged by the MOU was partially adhered to while there was breach of certain terms. The following table will make this amply clear:

Due date as per MOU	Date of Payment.	Amount (Rs.in Lacs.).
9.11.2004	10.11.2004	13
30.11.2004	30.11.2004	03 [as against 8 lacs.]
30.11.2004	28.12.2004	05 [part of 8 lacs].
28.02.2005	29.04.2005	14[as against 29 lacs]
28.02.2005	10.10.2005	15 lacs.[part of 29 lacs].

7 Subsequently respondent No.1 made the following payments.

Date.	Amount.
19.10.2005	Rs. 5 lacs.
25.10.2005	Rs.15 lacs.
26.12.2005	Rs. 22 lacs.
27.12.2005	Rs. 8.70 lacs.

It is also an accepted fact that interest of Rs.3,37,657/- @ 12% p.a. on delayed installments has been paid by respondent No.1.

8 Because of the default on the part of respondent No.1 in complying with condition No.2 of the MOU, on 17.01.2005 the petitioner-Bank wrote to respondent No.1 informing respondent No.1 that the respondent make payment of total sum of Rs. 29 lacs on or before 28.02.2005 so as to total upto Rs. 50 lacs and thereafter abide by condition No. 4 of the MOU failing which the MOU will be treated to have been cancelled and the benefit available to respondent No.1 under the one time settlement will not be granted to respondent No.1. It was further stated that any reliefs granted prior to this point of time shall also be treated as withdrawn / cancelled.

9 Sometime in August 2005 respondent No. 1 preferred Lavad Suit No. 890 of 2005 before the Board of Nominees, Vadodara seeking direction that in light of the understanding entered into between the parties on 08.11.2003 as well as 06.11.2004 the bank was prevented from taking any steps in relation to the properties mortgaged with the bank and declare that the bank has no such right in law. Furthermore,

various notices dated 25.08.2004 and 20.06.2005 were also challenged seeking declaration that the bank was not entitled to either issue said notices or take any steps in pursuance to the said notices.

10 During pendency of the aforesaid suit application Exh. 25 was moved by respondent No.1 whereunder it was prayed that bank may be directed to accept two bankers' cheques amounting to Rs.30,70,000/- and close the account of respondent No.1, declare that no further dues are outstanding from respondent No.1 and the bank should issue No Due Certificate. This application was moved on 29.12.2005. On 30.01.2006 the bank filed its reply to application Exh. 25 and in paragraph No.7 it is categorically stated that the averments made by respondent No.1 in the application were not acceptable to the bank. That MOU dated 06.11.2004 stood cancelled as respondent No.1 had failed to comply with the conditions stated in MOU and payments had not been made as per schedu/home/bhatt/sca1019107j3.sxwle recorded in MOU. That due to breach of MOU dated 06.11.2004 the said MOU stands cancelled and hence the bank is not required to accept the amount as per MOU and close the Account.

11. After hearing the parties vide order dated 17.03.2006 the Board of Nominees granted application Exh.25. Being aggrieved, the petitioner bank preferred Revision Application No. 113 of 2006 before the Gujarat Co-operative Tribunal. Vide order dated 18.10.2006 the Tribunal did not accept the Revision Application and rejected the same.

12. On behalf of the petitioner-bank Mr.Mihir Joshi, learned Senior Advocate contended that the MOU did not bring into effect any novation and any understanding for a one time settlement was merely a settlement subject to terms and conditions agreed upon between the parties, but the same would not amount to reduction of outstanding liability. That once a default had been committed of any of the conditions stipulated by the MOU the defaulting party cannot insist upon the other side continuing with the understanding which was a conditional understanding. Assailing the order made by the Board of Nominees, as confirmed by the Tribunal, it was submitted that application Exh. 25 was during pendency of the suit filed by respondent No.1, and in such circumstances, without leading any evidence by either side on the basis of mere pleadings in an interim application the Board of Nominees had virtually decided the suit and rendering the

suit filed by the petitioner bank infructuous. Reliance was placed, in support of the submissions made, on the decision of the Apex Court in the case of *United Bank of India Vs. Ramdas Mahadeo Prashad and others, (2004) 1 SCC 252* to submit that a party committing breach of terms and conditions of MOU can hardly seek to enforce the contract and that MOU does not amount to novation of contract as envisaged u/s. 62 of the Indian Contract Act, 1872.

13. As against that the learned Advocate appearing on behalf of the respondents submitted that both Board of Nominees and the Tribunal had come to the conclusion that there was no breach of any of the conditions, and though there was delay in making payment as per schedule recorded in MOU total payment had been made before the last date stipulated by the MOU viz. 31.12.2005, and therefore the parties were bound by MOU as held by the Board of Nominees and the Tribunal. It was further stated that once the petitioner bank had accepted the payments, even if the payments were late, acceptance of the payments would indicate that there was a deemed extension of the period stipulated in the MOU and hence, it was rightly held that terms of MOU had been complied with by respondent No.1. That even otherwise as the

MOU did not provide for any consequence for belated payments MOU cannot be made voidable at the instance of the petitioner bank. That in fact, the respondent had made payment of an amount which was ultimately more than the amount demanded by the petitioner bank. It was therefore submitted that when one considered condition No. 4 of the MOU the payments made by respondent No.1 were within the stipulated time and no interference was warranted in the orders made by the Board of Nominees and the Tribunal.

14 When one considers the conditions recorded in the MOU, on a plain reading it becomes clear that condition Nos. 1, 2 and 3 relate to payments of different amounts at stated intervals on specified dates. Condition No. 4 states that out of Rs. 97,38,343/- due to the petitioner bank, after amount of Rs. 50 lacs which is paid as per condition Nos. 1, 2 and 3, a request be made by respondent No.1 to the bank to convert balance amount along with interest into a Term Loan for a period of nine months commencing from 01.04.2005 and ending on 31.12.2005, and such amount of Term Loan to be paid in nine equal installments. Thus 31.12.2005 is not the last date for overall payment but is the second termini of the period of nine months commencing from 01.04.2005 of Term

Loan. Both Board of Nominees and the Tribunal have fallen into error in reading 31.12.2005 as being last date or the final termini for the purpose of making total payment.

15. Admittedly as per the table recorded hereinbefore there was breach of both condition Nos. 2 and 3 of the MOU. By 30.11.2004 a cheque was to be deposited for a sum of Rs.8 lacs and such cheque had to be dated 11.11.2004 but only presenting thereof was postponed on a request made by respondent No.1 due to festive season. As against that no cheque for a sum of Rs. 8 lacs dated 11.11.2004 was ever tendered but a sum of Rs. 3 lacs only was paid on 30.11.2004 while the balance amount of Rs. 5 lacs was paid on 28.11.2004.

16 Similarly in relation to condition No. 3 another amount of Rs. 29 lacs had to be paid by 28.02.2005 but admittedly the said amount was paid in two belated installments of Rs.14 lakhs on 29.4.2005 and of Rs. 15 lakhs on 10.10.2005.

17 Therefore, as required by condition No. 4 there was no occasion for respondent No.1 to make a request to convert the balance amount outstanding as on 1.3.2005 into a Term

Loan for a period of nine months with effect from 01.04.2005. In absence of any such request the balance amount outstanding remained outstanding as amount due and there was no conversion into a Term Loan. In fact the MOU envisaged novation at this stage by converting such outstanding amount into a Term Loan which would have different concomitants including different rate of interest. Not only did respondent No.1 not undertake such exercise as envisaged by condition No.4 of the MOU but even the interest paid by respondent No.1 is at the rate, as admitted by the learned Advocate, determined by respondent No.1 on its own.

18 When one reads the orders made by the Board of Nominees and the Tribunal it becomes apparent that the import of condition No.4 has been lost sight of in entirety and both the authorities have merely picked up one date out of entire condition i.e. 31.12.2005 for coming to the conclusion that this was the outer limit for making payment of total amount. Both the authorities have failed to grasp and appreciate that 31.12.2005 was not a date in isolation and had nexus with the first termini, i.e. 01.04.2005, which in turn had connection with a request being made for conversion of outstanding amount into a Term Loan upon respondent No.1

discharging the liability as per schedule stipulated by condition Nos. 1, 2 and 3. In fact, orders of both, Board of Nominees and the Tribunal are silent in this regard. Hence, it is apparent that not only both the authorities have failed to appreciate the true import of MOU but have read something in the MOU which is not warranted on a plain reading of language employed by MOU. It is well settled that an agreement which is reduced in writing by the parties cannot be read by the Adjudicating Forum beyond the terms agreed upon by the parties. What is not written cannot be read on the specious plea of interpreting the document or the intention of the parties. In the present case it is not only a case of misinterpretation but it is a case of glaring omission to consider condition No.4 in its proper perspective considering that there was an interlinking with condition Nos. 1, 2 and 3, compliance thereof, and operation of condition No.4.

19 When one reads order dated 07.03.2006 made by the Board of Nominees it is apparent that the authority had contradicted itself when on the one hand it is recorded that the amount stipulated in the MOU has been paid off within the time specified in the MOU dated 06.11.2004 and the defendant, viz. the petitioner bank herein, has no dispute on

this aspect, while on the other hand, in the immediately following paragraph it is recorded that the amount has not been paid as per conditions stated in the MOU, and therefore numerous suggestions were made to the bank to call respondent No.1 personally and to decide a penal amount directing respondent No.1 to make payment of the same within a fixed period but the bank has failed to do so. Thus Board of Nominees on the one hand states that there is no dispute that the amount has been paid as per the schedule stipulated by MOU and in the immediately next breath records that a default has been committed by respondent No.1 for which respondent No.1 was required to make payment of some penalty which may be fixed by the bank. The Board of Nominees failed to appreciate that, as narrated hereinbefore, vide paragraph No.7 of the reply tendered by the bank in the said proceedings of application Exh. 25 the bank had categorically stated that there was breach of conditions of MOU and hence MOU stood cancelled and there was no question of directing any party to comply with the same.

20 This order of the Board of Nominees has been confirmed by the Tribunal. After noting the contention raised on behalf of the petitioner bank that as per Section 55 of the Indian

Contract Act time is of essence is the underlying requirement of the provisions and hence, once there was a breach the MOU could not be acted upon, the Tribunal proceeds on the footing that as per MOU the amount has to be paid by 31.12.2005 and the same has been paid accordingly. That there is no condition that one party will terminate the MOU upon non compliance with the conditions of the MOU by the other party. It is further stated that even if the time schedule has not been adhered to by respondent No.1 as Board of Nominees has awarded interest for such belated payments the Revision Application moved by the bank is not required to be granted.

21 Thus it is apparent that both the orders suffer from basic legal infirmity in reading into the terms of agreement something which is not provided for in the agreement. In the aforesaid decision in case of *United Bank of India (supra)* the MOU entered into between the parties before the Apex Court provided withdrawal of the suit as well as filing of consent decree on receipt of the stipulated amount and release of securities by the bank after full and final payment. In paragraph No.6 of the judgment it has been noted that three conditions stipulated by the MOU were not complied with and

therefore there was no concluded contract nor was there any novation. Even otherwise, the Court has held that once there is no compliance with the terms and conditions of the MOU a party in breach can hardly seek to enforce a contract and MOU per se does not amount to novation of contract as required by Section 62 of the Indian Contract Act.

22 Therefore, both on facts and in law the orders made by the Board of Nominees on 17.03.2006 and by the Tribunal on 18.10.2006 cannot be sustained and are hereby quashed and set aside. It will be open to the parties, more particularly respondent No.1, to raise the contention regarding having made more payment than required in appropriate proceedings or in proceedings under the Securitisation Act. The petition is allowed accordingly in the aforesaid terms. Rule made absolute. There shall be no order as to costs.

23 At this stage, the learned Advocate for the respondent prays for stay of operation of judgment and order. Request is rejected taking into consideration the facts and circumstances of the case.

Sd/-
(D.A.Mehta, J.)

m.m.bhatt